

**United States Department of Labor
Employees' Compensation Appeals Board**

E.W., Appellant

and

**U.S. POSTAL SERVICE, PROCESSING &
DISTRIBUTION CENTER, Denver, CO,
Employer**

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**Docket No. 17-0707
Issued: September 18, 2017**

Appearances:

*Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On February 8, 2017 appellant, through counsel, filed a timely appeal from a December 12, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; see also 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether appellant is entitled to a schedule award for permanent impairment of the upper extremities.

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and circumstances outlined in the Board's prior decision are incorporated herein by reference. The facts relevant to this appeal are set forth below.

On December 2, 2001 appellant, then a 47-year-old tractor trailer operator, filed a traumatic injury claim (Form CA-1) alleging that on December 1, 2001 he injured his neck in the performance of duty. OWCP accepted the claim, assigned File No. xxxxxx615, for cervical strain, displacement of a cervical disc at C5-6, cervical brachial neuritis or radiculitis, and C4-5 and C6-7 adjacent cervical disc disorders. On April 1, 2002 appellant underwent an anterior cervical discectomy and fusion at C5-6. On October 30, 2003 he underwent an anterior arthrodesis at C4-5, C5-6, and C6-7, a revision anterior cervical corpectomy at C5-6, an anterior cervical instrumented fusion, a posterocervical laminectomy and instrumented fusion, and a structural fibular allograft.⁴ Appellant returned to his usual employment on February 16, 2004 and subsequently claimed a schedule award (Form CA-7).

OWCP additionally accepted that on June 13, 2007, while pushing a bulk mail container in the performance of duty, appellant sustained lumbar and sacroiliac ligament sprains under File No. xxxxxx637.⁵ It administratively combined the files with OWCP File No. xxxxxx615 serving as the master file.

By a decision dated February 23, 2007, OWCP denied appellant's claim for a schedule award (Form CA-7). It found that he had not submitted any evidence supporting permanent impairment of the upper extremities due to his accepted cervical injury. Appellant requested reconsideration. In decisions dated June 15 and September 7, 2007 and May 20, 2008, OWCP denied modification of its February 23, 2007 decision.

Appellant, on July 12, 2010, filed an additional claim for a schedule award (Form CA-7). OWCP referred him to Dr. Richard T. Katz, a Board-certified physiatrist, for an impairment evaluation. In a report dated November 23, 2010, Dr. Katz found that appellant had no radiculopathy in the neck or lower back and thus no permanent impairment of either the upper or lower extremities. An OWCP medical adviser reviewed Dr. Katz' opinion and concurred with his finding that appellant had no permanent impairment of the upper or lower extremities.

³ Docket No. 13-1295 (issued July 22, 2014).

⁴ By decision dated August 23, 2002, OWCP found that appellant was not entitled to continuing compensation as the evidence of record established that he could return to work without restrictions.

⁵ Under File No. xxxxxx637, in a decision dated September 23, 2008, OWCP denied appellant's claim for a schedule award of the neck or lower extremities. Appellant worked for the employing establishment in St. Louis, MO during this time.

By decision dated December 8, 2010, OWCP denied appellant's claim for a schedule award finding that he had not established impairment due to either his December 1, 2001 or his June 13, 2007 work injuries.

On January 11, 2011 Dr. Thomas K. Lee, a Board-certified orthopedic surgeon, diagnosed lumbar radiculopathy due to the June 13, 2007 work injury. He found a positive straight leg raise and weakness in the right extensor hallucis longus consistent with instability at L3-4. Dr. Lee opined that appellant had 12 percent permanent impairment under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (2009).

Appellant, on March 17, 2011, requested reconsideration. An OWCP medical adviser reviewed Dr. Lee's report on April 29, 2011, noting that he found 12 percent whole person permanent impairment. The medical adviser determined that Dr. Lee's report did not support entitlement to a schedule award as he did not provide a rating in accordance with the A.M.A., *Guides*. By decision dated May 11, 2011, OWCP denied modification of its December 8, 2010 decision.

Appellant again requested reconsideration on October 5, 2011. In a November 7, 2011 report, Dr. Lee opined that appellant had 16 percent permanent impairment due toolisthesis at L3-4 and 10 percent permanent impairment due to olisthesis at L4-5. An OWCP medical adviser reviewed Dr. Lee's report and found that it did not support entitlement to a schedule award as he rated appellant's impairment using Table 17-4 on page 571 of the sixth edition of the A.M.A., *Guides*, relevant to determining impairments of the spine due to spondylolisthesis. In a decision dated January 13, 2012, OWCP denied modification of its May 11, 2011 decision.

In a report dated August 17, 2012, Dr. M. Stephen Wilson, an attending orthopedic surgeon, reviewed the history of injury and discussed appellant's current complaints of neck pain radiating into the extremities and tingling. Citing Proposed Table 1 of the A.M.A., *Guides Newsletter* (July/August 2009) (*The Guides Newsletter*), he found 10 percent permanent impairment of each upper extremity.

On January 2, 2013 appellant, through counsel, again requested reconsideration.

On March 17, 2013 an OWCP medical adviser opined that Dr. Wilson's August 17, 2012 report did not support an impairment rating. He found that Dr. Wilson did not conduct sensory testing for any extremity, but instead found sensory symptoms based on his subjective history and also did not perform the appropriate strength testing or consider alternate explanations for the loss of strength such as peripheral entrapment neuropathy or tendinitis. On April 1, 2013 OWCP denied modification of its January 13, 2012 decision.

Appellant appealed to the Board. In a decision dated July 22, 2014, the Board affirmed the April 1, 2013 OWCP decision.⁶ The Board found that Dr. Wilson's opinion lacked sufficient probative value to support a schedule award of either upper extremity.

⁶ *Supra* note 3.

An electromyogram (EMG) and nerve conduction velocity (NCV) study performed February 27, 2015 revealed axonal sensorimotor polyneuropathy, mild carpal tunnel syndrome, severe left ulnar neuropathy, and a “chronic left C6-7 radiculopathy....”

In a May 15, 2015 impairment evaluation, Dr. Neil Allen, a Board-certified neurologist and internist, described appellant’s work injury and resulting surgeries. He diagnosed displacement of a cervical intervertebral disc without myelopathy. Dr. Allen discussed appellant’s complaints of cervical pain radiating through both arms into his digits and evaluated range of motion, strength, and sensation of the cervical spine. He noted that a February 27, 2015 EMG showed mild left carpal tunnel syndrome, severe left ulnar neuropathy, and chronic radiculopathy at C6-7. Dr. Allen found that, under *The Guides Newsletter*, appellant had 9 percent motor deficit at C6 and C7, and 3 percent sensory deficit at C8, for a total upper extremity impairment of 21 percent. In reaching his impairment determination, Dr. Allen used grade modifiers for clinical studies in adjusting from the default value for each spinal nerve root based in part on the EMG study finding significant left ulnar neuropathy.

Appellant, on August 11, 2015, filed an additional claim for a schedule award (Form CA-7).

An OWCP medical adviser reviewed the evidence on October 5, 2015. He found that Dr. Allen utilized findings of peripheral nerve entrapment on electrodiagnostic testing to rate appellant’s impairment rather than basing the rating only on radiculopathy. The medical adviser recommended a second opinion examination.

OWCP, by letter dated October 8, 2015, again referred appellant to Dr. Katz for a second opinion examination. In an accompanying statement of accepted facts (SOAF), it listed the accepted conditions as a disc herniation at C5-6, cervical radiculopathy, C4-5 and C6-7 adjacent disc disorder, and cervical strain.

In an October 27, 2015 report, Dr. Katz listed the “reported diagnoses” for appellant as cervical strain with radicular components, right C6 radiculopathy, adjacent segment disease, a worsening of symptoms after a 2005 motor vehicle accident, low back strain due to a June 13, 2007 work injury, and to rule out a right herniated disc at L4-5. He reviewed the medical evidence, noting that a February 27, 2017 EMG and NCV showed severe left ulnar neuropathy with axonal loss, chronic C6-7 left radiculopathy, and mild left carpal tunnel syndrome. Dr. Katz discussed appellant’s complaints of neck pain and tingling in the fourth and fifth fingers of both hands. On examination, he found reduced cervical motion and absent muscle stretch reflexes in the “biceps, triceps, brachioradialis, and pronator teres.” Dr. Katz further found a loss of sensation in the fourth and fifth digits bilaterally and clear weakness in the first dorsal interosseous bilaterally with atrophy of the first web space. He measured grip strength of 40 on the right and 25 on the left. Dr. Katz opined that appellant reached maximum medical improvement (MMI) on February 13, 2004 when appellant was released to resume work without limitations. He found no evidence of right C5 or C6 radiculopathy, but “diffuse peripheral neuropathy, severe bilateral ulnar neuropathy, [and] bilateral carpal tunnel syndrome well documented clinically and electrophysiologically.” Dr. Katz noted that OWCP advised that appellant should receive a rating only for radiculopathy, and found that appellant had no impairment as there was no evidence of cervical radiculopathy.

An OWCP medical adviser reviewed the evidence on November 11, 2015 and concurred with Dr. Katz' finding that appellant had no permanent impairment due to cervical radiculopathy using *The Guides Newsletter*. The medical adviser identified the date of MMI as October 27, 2015.

By decision dated February 1, 2016, OWCP denied appellant's claim for a schedule award.

On February 8, 2016 appellant, through counsel, requested a telephone hearing before an OWCP hearing representative. At the telephone hearing, held on October 14, 2016, counsel contended that a conflict in the medical opinion evidence arose between Dr. Allen and the second opinion physician that was inappropriately resolved by OWCP's medical adviser. He asserted that *The Guides Newsletter* required electrodiagnostic testing which the medical adviser failed to consider.

In a decision dated December 12, 2016, OWCP's hearing representative affirmed the February 1, 2016 decision. She found that Dr. Allen failed to provide sensory testing of the upper extremities and used findings of peripheral nerve entrapment to increase grade modifiers.

On appeal counsel contends that OWCP disregarded evidence and that he is entitled to a schedule award.

LEGAL PRECEDENT

The schedule award provisions of FECA,⁷ and its implementing federal regulations,⁸ set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of scheduled members, or functions of the body. However, it does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law for all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.⁹ As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.¹⁰

The sixth edition requires identifying the impairment class for the diagnosed condition Class of Diagnosis (CDX), which is then adjusted by grade modifiers based on Functional History (GMFH), Physical Examination (GMPE) and Clinical Studies (GMCS).¹¹ The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).

⁷ 5 U.S.C. § 8107.

⁸ 20 C.F.R. § 10.404.

⁹ *Id.* at § 10.404(a).

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (February 2013); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

¹¹ A.M.A., *Guides* 494-531.

Neither FECA nor its regulations provide for a schedule award for impairment to the back or to the body as a whole.¹² Furthermore, the back is specifically excluded from the definition of organ under FECA.¹³ The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as impairments of the extremities. Recognizing that FECA allows ratings for extremities and precludes ratings for the spine, *The Guides Newsletter* offers an approach to rating spinal nerve impairments consistent with sixth edition methodology. For peripheral nerve impairments to the upper or lower extremities resulting from spinal injuries, OWCP procedures indicate that *The Guides Newsletter* is to be applied.¹⁴

Proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. While the claimant has the burden of proof to establish entitlement to compensation, OWCP shares responsibility to see that justice is done.¹⁵ The nonadversarial policy of proceedings under FECA is reflected in OWCP's regulations at section 10.121.¹⁶ Once OWCP undertakes to develop the medical evidence further, it has the responsibility to do so in a proper manner.¹⁷

ANALYSIS

OWCP accepted that appellant sustained cervical strain, displacement of a cervical disc at C5-6, cervical brachial neuritis or radiculitis, and adjacent cervical disc disorders at C4-5 and C6-7 due to a December 1, 2001 employment injury. Appellant underwent an anterior cervical discectomy and fusion at C5-6 on April 1, 2002. On October 30, 2003 he underwent an anterior arthrodesis at C4-5, C5-6, and C6-7, a revision anterior cervical corpectomy at C5-6, an anterior cervical instrumented fusion, and a posterocervical laminotomy and instrumented fusion with a structural fibular allograft, following which he resumed his usual employment.

Appellant filed schedule award claims, which OWCP denied in decisions dating from 2007 through 2013. In a decision dated July 22, 2014, the Board affirmed an April 1, 2013 OWCP decision finding that he had not established entitlement to a schedule award for a permanent impairment of either arm.

On August 11, 2015 appellant again filed a claim for a schedule award. In an impairment evaluation dated May 15, 2015, Dr. Allen, citing *The Guides Newsletter*, found that appellant had nine percent permanent impairment due to a motor deficit at C6 and C7 and three percent permanent impairment due to a sensory deficit at C8. He did not, however, explain how he found nerve root impairment at C8 radiating into the extremities given the EMG findings of

¹² See *N.D.*, 59 ECAB 344 (2008); *Tania R. Keka*, 55 ECAB 354 (2004).

¹³ See 5 U.S.C. § 8101(19); *Francesco C. Veneziani*, 48 ECAB 572 (1997).

¹⁴ *Supra* note 10 at Chapter 3.700 (January 2010). *The Guides Newsletter* is included as Exhibit 4.

¹⁵ *Jimmy A. Hammons*, 51 ECAB 219 (1999).

¹⁶ 20 C.F.R. § 10.121.

¹⁷ *Melvin James*, 55 ECAB 406 (2004).

cervical radiculopathy only at C6-7. Dr. Allen further did not provide a sensory evaluation for the upper extremities. Additionally, he applied grade modifiers based on the peripheral neuropathy, a condition not accepted as work related. The A.M.A., *Guides* provides that grade modifiers are used to assess factors “attributable to the condition being rated...”¹⁸

An OWCP medical adviser reviewed Dr. Allen’s report and recommended a second opinion evaluation. OWCP referred appellant to Dr. Katz. It provided the physician with a SOAF describing the accepted conditions due to the December 1, 2001 work injury as a C5-6 disc herniation, an adjacent disc disorder at C4-5 and C6-7, cervical radiculopathy, and cervical strain.

Dr. Katz’ October 27, 2015 impairment evaluation identified the accepted conditions as cervical strain with radicular components, right C6 radiculopathy, and adjacent segment disease. He reviewed the diagnostic studies, noting that the February 27, 2017 EMG revealed chronic left radiculopathy at C6-7, left ulnar neuropathy, and mild left carpal tunnel syndrome. On examination Dr. Katz measured reduced sensation in the fourth and fifth digits bilaterally with weakness in the first dorsal interosseous bilaterally with web space atrophy. He found no numbness from a right C6 distribution. Dr. Katz opined that appellant had no evidence of C5 or C6 radiculopathy on the right. He concluded that he had no evidence of residual cervical radiculopathy and thus no impairment of the arms. Dr. Katz advised that appellant reached MMI on February 13, 2004.

An OWCP medical adviser, on November 11, 2015, concurred with the opinion of Dr. Katz that appellant had no permanent impairment due to cervical radiculopathy using *The Guides Newsletter*. He found, however, that the date of MMI was October 27, 2015.

The Board finds that the case is not in posture for decision. Dr. Katz found that the accepted condition was a right C6 radiculopathy and specifically determined that there was no evidence of right C5 or C6 radiculopathy. He noted that the EMG study found chronic left radiculopathy at C6. The SOAF provided to Dr. Katz, however, indicated that OWCP had accepted cervical radiculopathy rather than right C5 and C6 radiculopathy. OWCP provided him with a SOAF to ensure his report was based on a proper factual background.¹⁹ To the extent that Dr. Katz’ opinion is outside the framework of the SOAF, it is based on an inaccurate history and, thus, of diminished probative value.²⁰

¹⁸ A.M.A., *Guides* 406.

¹⁹ See *supra* note 9 at Part 3 -- Medical, *Requirements for Medical Reports*, Chapter 3.600.3 (October 1990) (when OWCP’s medical adviser, second opinion specialist or referee physician renders a medical opinion based on a SOAF which is incomplete or inaccurate or does not use the SOAF as the framework in forming his or her opinion, the probative value of the opinion is seriously diminished or negated altogether).

²⁰ See *Douglas M. McQuaid*, 52 ECAB 382 (2001) (medical reports must be based on a complete and accurate factual and medical background and medical opinions based on an incomplete or inaccurate history are of little probative value).

As discussed, once OWCP undertakes development of the medical evidence it has the responsibility to do so in a manner that will resolved the relevant issues in the case.²¹ Upon return of the case record, it should obtain a reasoned opinion addressing whether appellant has a permanent impairment of the upper extremities causally related to his accepted employment injuries. If so, the Board notes that preexisting impairment to the scheduled member is to be included.²² Following such further development as OWCP deems necessary, it shall issue a *de novo* decision.

CONCLUSION

The Board finds that the case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the December 12, 2016 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: September 18, 2017
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

²¹ See *M.C.*, Docket No. 09-1880 (issued June 21, 2010).

²² *Peter C. Belkind*, 56 ECAB 580 (2005).